2. GENERAL PRINCIPLES

Although there are comparatively few published cases that define the rules governing school searches, and although this area of law remains unsettled, there are several fundamental principles that are well established. We can, therefore, draw some legal conclusions with a fair degree of confidence, even though the outcome of these kinds of cases are generally said to be "fact sensitive," and will depend to a large extent on the specific facts unique to each case. (Recall that in the landmark T.L.O. cases, the United States Supreme Court and the New Jersey Supreme Court reached completely different conclusions in applying essentially identical legal standards to the same set of facts.)

Certain general, overarching principles should be carefully considered by any school official or law enforcement officer before undertaking any conduct that might be deemed to be a "search" or a "seizure." These general principles include the following:

2.1. Privacy Rights Versus Property Rights.

A search entails an invasion of privacy. The United States Supreme Court recognized in New Jersey v. T.L.O. that the situation in schools is not so dire that students may claim no expectation of privacy while on school grounds. Nor was the Court prepared to equate schools with prisons for purposes of the Fourth Amendment. The Court, yielding to the practical realities of modern school life, observed that:

> Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on to school grounds.
> [469 U.S. at 338-339, 105 S.Ct. at 741.]

At least one state court, however, has held that students do not enjoy a reasonable expectation of privacy *in their lockers* where a school district approves a written policy retaining ownership and possessory control of school lockers. See In the Interest of Isiah

B., 500 N.W.2d 637, 641 (Wis. 1993). In that case, students were given notice not only that lockers are the property of the school district, but also that lockers could be inspected by school officials "for any reason at any time." Id. at 639, n.1. The Wisconsin Supreme Court's apparent willingness to permit a school district unilaterally and completely to extinguish students' Fourth Amendment privacy rights in their lockers is hard to reconcile with the vast majority of published court decisions. Most courts have consistently found that students maintain some reasonable expectation of privacy in a locker. See Berman, *Students' Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception,* N.Y.U. L. Rev. 1077, 1003-1104 (1991). As one Pennsylvania court observed:

> We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which a student takes to school, but would lose that expectation of privacy merely by placing the purse or jacket in [the] school locker provided to the student for storage of personal items. [In the Interest of Dumas, 357 P.A. Super. 294, 515 A.2d, 984, 985 (1986).]

Indeed, both the United States and New Jersey Supreme Courts in T.L.O. made clear that students may have a reasonable expectation of privacy in property that the students do not actually own. The legal question concerning the validity of a search, in other words, cannot be decided merely by reference to arcane notions of property law. Rather, courts will also consider whether the search violated a reasonable expectation of privacy. The mere fact that a school technically "owns" a locker does not mean that the locker can be opened at any time and without regard to the Fourth Amendment or Article I, Paragraph 7 of the State Constitution. The New Jersey Supreme Court in T.L.O. concluded in this regard that:

> We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. "[T]he Fourth Amendment protects people, not places."
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> * * *
>
> For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal "effects" protected by the Fourth Amendment. A student is justified in believing that the master key to the locker will be employed at either his request or convenience.

> That a master key exists to gain access to a hotel room does not make it any less entitled to privacy.
> [State in the Interest of T.L.O., 94 N.J. 331, 348-349 (1983) rev'd sub nom., New Jersey v. T.L.O., 469 U.S. 325 (1985) (citations omitted).]

Although the legality of a search will thus turn on questions of privacy rather than property law, this is not to suggest that the issue of who owns the property or place to be searched is irrelevant. Obviously, school officials have more control and authority over property that the school owns, such as lockers and desks, than they have over a student's vehicle that happens to be parked in a school-owned lot or over personal property such as bookbags, purses, and knapsacks that are brought by students on to school grounds. Property owned by students and brought on to school grounds is nonetheless subject to lawful search and seizure by school officials in accordance with the standards established in T.L.O.. (Indeed, the specific property at issue in T.L.O. was a student's purse.) School officials can also impose reasonable restrictions on the use of student property while it is on school grounds or at school functions.

Furthermore, when a student in response to questions posed by a school official denies ownership or possessory interest in a particular object such as a bookbag, the student has little or no expectation of privacy with respect to the contents of that bookbag, and he or she cannot later complain that the school official opened and searched that container. See State v. Moore, 254 N.J. Super. 295 (App. Div. 1992).

A student also loses any legitimate expectation of privacy in property or belongings that he or she "abandons." In the Fourth Amendment context, a person is said to abandon property when he or she voluntarily discards, leaves behind, or otherwise relinquishes control under circumstances where it appears that the person has no intention of reclaiming the property. See e.g., State v. Farninch, 179 N.J. Super. 1 (App. Div. 1981). Thus, for example, a student who discards a package while fleeing from police (or school officials) loses his expectation of privacy in its contents and the subsequent act by police of opening such a discarded package is technically not a "search" for Fourth Amendment purposes. Note, of course, that the act of abandonment must be volitional as well as unequivocal. A school official could not order a student to discard an object and then rely upon the student's compliance as if it were an act of abandonment. This is true even if the object is contraband and the student had no legal right to bring or keep it on school grounds in the first place.

Furthermore, the New Jersey Supreme Court in State v. Hempele, 120 N.J. 182 (1990) ruled that under the State Constitution, a person retains an expectation of privacy in garbage that is placed out for collection. This is one of the cases where the

New Jersey Supreme Court has "respectfully parted company" with the United States Supreme Court, which had earlier held that garbage is a form of abandoned property for Fourth Amendment purposes. See California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed. 30 (1988). Although the exact parameters of the Hempele rule are unclear, it would appear that school officials could not rummage through wastepaper baskets absent reasonable grounds to believe that evidence of an offense or infraction would be found therein, at least where the true purpose of the examination is to find evidence. Note that this strict rule would *not* apply if a school custodian, while performing his or her function to empty wastebaskets, came across an object that was immediately recognized as contraband or evidence of an offense. See Chapter 11 for a more complete discussion of the "plain view" doctrine. So too, the Hempele rule would not apply if a student while being chased happened to discard an object into a waste receptacle rather than onto the ground. Of course, in that event, the facts justifying the pursuit would probably satisfy the reasonable grounds standard needed to justify the seizure and opening of the discarded object, thus rendering academic whether the act by school officials of opening such an object constitutes a "search" for purposes of constitutional analysis.

2.2. Seize Before Opening.

Under the Fourth Amendment and its state constitutional counterpart, a search — the act of opening a locker or closed container — entails an invasion of privacy, whereas a seizure — the temporary dispossession of personal property — involves somewhat less important constitutional rights, especially in the context of the school setting. Therefore, when in doubt, it is often better from a legal perspective for a school official to seize an object or to "secure" a locker (i.e., prevent students from gaining access to the locker), and then to contact law enforcement authorities. Responding police officers, in turn, should obtain a search warrant, rather than open the locker on their own authority. In sum, when a school official is uncertain how to proceed, the better practice would be to take steps to maintain the status quo and to contact the police and prosecutor for advice.

2.3. Critical Importance of Providing Notice of the Right and Intention to Conduct Searches.

One of the best ways to reduce or minimize a student's "expectation of privacy" is to announce to all students and to their parents and/or legal guardians that school authorities expressly retain the right to conduct searches of lockers, desks, or other property, including property owned by the students and brought on to school grounds. School authorities should do more than merely reserve the right to conduct a search.

They should announce that they intend to conduct such inspections or searches as often as may be necessary to maintain order and discipline and to protect the safety and well-being of the entire school community.

State law codified at N.J.S.A. 18A:36-19.2 expressly provides that:

> The principal or other officials designated by the local board of education may inspect lockers or other storage facilities provided for use by students so long as students are informed in writing at the beginning of each school year that inspections may occur. (emphasis added)

Providing advance notice of the right and intention to conduct searches serves two distinct and important purposes. First, advance or "fair" notice provides students with an opportunity to limit the effect of the privacy intrusion by not bringing or keeping highly personal items (such as implements of personal hygiene, contraceptives, evidence of sexual orientation, etc.) on to school grounds. Second, advance notice promotes school safety by serving as a deterrent, discouraging students from bringing or keeping dangerous weapons, drugs, or other contraband on school property, since students would know that these items would be subject to discovery and that such discovery might result in school discipline or even criminal prosecution. After all, the whole point of an inspection program would be lost were it to be kept a secret.

We should keep firmly in mind that our ultimate goal is *not* to seize drugs and other contraband, or to catch students in actual or constructive possession of drugs or weapons so that we can prosecute or discipline them. Rather, we hope to ensure the safest possible environment for all students by preventing and discouraging students from engaging in dangerous conduct on school grounds that might subject them to school suspension, expulsion, or criminal prosecution. (See Chapter 4.4D for a more detailed discussion of whether and to what extent the lawfulness of a search depends on the "purpose" of the official undertaking the search.) To accomplish this critical deterrent objective, it is essential that school officials make clear their intention to conduct reasonable searches and seizures as a means to enforce school rules.

All members of the school community benefit when students are fully aware of their rights and their responsibilities. Moreover, the debate on how best to respond to the problem and on what tactics to use provides an excellent opportunity for law enforcement and education officials to reach out to members of the school community and parents to discuss the scope and nature of a particular district's or school's drug problem, and the efforts being undertaken to respond to that problem. See Chapter

4.5F(2) for a discussion on the need to solicit parent input in designing a program to use drug-detection dogs.

2.4. Providing Advance Notice is not the Same as Obtaining Consent to Search.

A few courts and commentators have suggested that providing advance notice of the school's intention to conduct searches is tantamount to obtaining "consent" to conduct these searches. Consent is one of the recognized exceptions to the probable cause and warrant requirements imposed upon law enforcement officers. Police officers, for example, are allowed to ask for permission to conduct a search even if they do not have probable cause or even a mere reasonable articulable suspicion to believe that the consent search will reveal evidence of crime. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992).

Law enforcement and school officials should not, however, proceed under the assumption that a student has actually or impliedly consented to the search of a locker or other property merely because the student has agreed to use the locker subject to certain conditions, or has agreed to such inspections as a condition of bringing the property, such as a vehicle, on to school grounds. (The law of consent is discussed in more detail in Chapter 8.) For present purposes, it is enough to note that given the tender age and lack of maturity and sophistication of primary and even secondary school students — most of whom are considered under the law to be minors or "juveniles"— reviewing courts, especially in New Jersey, are likely to be skeptical of any claim that a student has consented to a search or inspection.

Even if that particular hurdle is overcome (i.e., by obtaining consent from a parent or legal guardian in addition to or in lieu of getting permission from the student), it is doubtful that any such general consent, given in advance of a specific request to search, would be deemed to be "voluntary" under New Jersey law. This is one of the areas where the New Jersey Supreme Court has diverged from federal precedent and has provided persons charged with criminal offenses with far greater protections under the State Constitution than are afforded to defendants under the United States Constitution, as interpreted by the United States Supreme Court and other federal courts. The New Jersey Supreme Court has made clear, for example, that any person giving consent must be aware that he or she has the *right to refuse* consent, and that such refusal would be respected by government authorities. See State v. Johnson, 68 N.J. 349 (1975). (Under federal law, in contrast, knowledge of the right to refuse is not absolutely required, and is only one of several factors used by federal courts to determine whether a consent was voluntary. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).) If, in fact, the student or legal guardian is not really free to

refuse to give consent, it is likely that any such permission would be deemed by New Jersey courts to be coerced or "involuntary" under New Jersey law.

Similarly, it is unlikely that the New Jersey Supreme Court would embrace the concept of "implied consent." The doctrine of implied consent has been used to authorize police, for example, to demand a driver who has been lawfully stopped to produce certain credentials (e.g., driver's license, vehicle registration, rental agreement, or insurance identification card) and to require suspected drunk drivers to submit to breath testing to confirm or dispel an officer's reasonable suspicion that the motorist is under the influence of alcohol or other intoxicating substances. These law enforcement actions are said to be impliedly consented to in advance by those who elect to use New Jersey's roads and highways. It is critical to note, however, that the implied consent doctrine does *not* allow police to conduct unreasonable credential searches. Nor does it allow police to stop a vehicle absent a reasonable suspicion that the driver is impaired, or to arrest a suspected impaired driver unless there is probable cause to make the arrest.

In the context of school searches, under the theory of implied consent, students would be deemed to have consented to searches, at least those undertaken by school officials to enforce general school regulations or particular rules and regulations concerning the use of lockers, when the students agree to accept the assignment of a locker at the beginning of a school year or semester. Students who refuse to accept these conditions are simply denied access to a locker, and, by the same token, students may elect not to waive their Fourth Amendment rights in advance simply by declining to apply for or accept a locker assignment.

Some commentators have referred to this theory as a "legal fiction." According to one noted Fourth Amendment scholar:

> The fiction of implied consent is inconsistent with the established rule that even privileges may not be conditioned upon the surrender of constitutional rights... . It has no place in the analysis of searches directed at students, for it diverts attention from the fundamental inquiry into the reasonableness of the particular search procedures at issue.
> [4 LaFave, Wayne R., *"Search and Seizure: A Treatise on the Fourth Amendment"* (3rd. ed. 1996) § 10.11(e) at p. 842.]

Indeed, the dubious validity of the implied consent doctrine is underscored by the United States Supreme Court's decision in T.L.O.. The New Jersey Attorney General in that case had argued that given the pervasive supervision to which children in school are subjected, they can have no legitimate expectation of privacy in articles of personal

property that are "unnecessarily" carried into a school. 106 S.Ct. at 741. The Court was not impressed by this argument, which it dismissed as being "severely flawed." Id. "Schoolchildren," the Court reasoned, "may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on to school grounds." Id. (emphasis added).

In light of this portion of the Court's decision in T.L.O., school officials would be hard pressed to argue that students have impliedly consented to a search of personal belongings when they choose to bring such items into the schoolhouse, when they apply for a locker in which to store these legitimate, noncontraband items, or when they drive a vehicle on to a school-owned parking lot.

In one case, a court in another jurisdiction did rule that students have no reasonable expectation of privacy at all in their lockers once they were advised of a school district policy whereby the school retained ownership and possessory control of school lockers and where students were warned that lockers could be inspected by school officials "for any reason at any time." See In the Interest of Isiah B., 500 N.W.2d 639, 641 (Wis. 1993). The Wisconsin Supreme Court in that case concluded that because students had no reasonable expectation of privacy in their lockers, the act by school officials of opening lockers to look for weapons did not constitute a "search" for Fourth Amendment purposes. Id. at 641.

That conclusion, however, may not carry much precedental weight in New Jersey. As was noted by the dissent in In the Interest of Isiah B.:

> While notice that a locker may be searched might diminish the reasonableness of a student's expectation that items stored there will be kept secret, numerous courts have repeatedly stated that a government proclamation cannot eradicate Fourth Amendment rights. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched." The school's ownership or partial control of the lockers cannot negate the students' expectation of privacy in the contents of the lockers. [500 N.W.2d at 645 (Abrahamson, J., concurring and dissenting) (citation to quoted authority and footnote omitted).]

See also Jones v. Latexo Ind. Sch. Dist., 499 F.Supp. 223, 234 (E.D. Tex. 1980) ("mere announcement by school officials that individual rights are about to be infringed upon cannot justify the subsequent infringement ... .")

In sum, although the New Jersey Supreme Court has not had the opportunity to address this issue, it is unlikely that it would permit school officials to require students to waive *all* Fourth Amendment privacy rights as a condition of being provided the use of a locker. Consider the following example: school officials clearly announce at the beginning of the school year that lockers provided to students are subject to periodic inspections. Given this advance notice, school officials could lawfully open and inspect the contents of lockers pursuant to a "neutral plan." (See Chapter 2.11.) The fact that such advance notice was given would not, however, authorize a principal to search a particular locker based on an unsubstantiated rumor that the student to whom the locker was assigned may have used drugs. Before the principal may open that particular locker, he or she would first have to meet the test established in New Jersey v. T.L.O., that is, the school official must be aware of facts that, taken as a whole, provide reasonable grounds to believe that a search of that particular locker would reveal drugs or other evidence of a criminal offense or violation of school rules.

The student in this case could not be said to have impliedly consented to any and all searches that the school might want to conduct of his locker merely because the student agreed to accept the locker assignment and to abide by the school's rules and regulations governing the use of a locker. Were it otherwise, the ruling in New Jersey v. T.L.O. would be largely meaningless, at least as applied to the searches of students' personal belongings that happen to be kept in lockers, and schools could easily circumvent the T.L.O. reasonable grounds standard simply by announcing at the start of the school year that the Fourth Amendment does not apply to lockers or perhaps even to other property that the school permits to be brought on to school grounds.

For the foregoing reasons, it would appear that the implied consent theory is not especially helpful in determining the lawfulness of a particular search. Rather, as Professor LaFave notes, the lawfulness of a given search will depend upon whether the search was conducted in a reasonable fashion.

2.5. Law Enforcement Searches Require a Higher Standard of Justification Than Searches Undertaken by School Officials.

When a search is conducted by a law enforcement officer or by a civilian or non-law enforcement government official acting under the direction of or in concert with a law enforcement officer, the search must be based upon "probable cause" to believe that evidence of a crime will be discovered. This is a higher standard of proof than the "reasonable grounds" or "reasonable suspicion" standard used to justify a search conducted by school officials acting independently and on their own authority to maintain order and discipline. In addition, where a search is conducted by or at the

behest of a law enforcement officer, the officer must first obtain a search warrant from a Municipal or Superior Court judge, unless the search falls into one of the narrowly drawn "exceptions" to the warrant requirement (such as a search "incident to a lawful arrest," the "automobile exception," "plain view," "consent," or "exigent circumstances").

The strict standards governing law enforcement searches apply at all times to all law enforcement officers, without regard to whether they are on or off-duty. Furthermore, a law enforcement officer who is employed by a school district is still a law enforcement officer and must always comply with the stricter rules governing law enforcement searches and seizures, even if the officer is acting under the direction of a school official.

A school official has no legal authority to order a law enforcement officer, other than one employed by a school district pursuant to N.J.S.A. 18A:6-4.2 et seq., to conduct a search. If any law enforcement officer undertakes a search at the request of a school official, the legality of that search will be judged by the standards governing law enforcement searches (i.e., full probable cause and a warrant issued by a judge, or facts establishing a recognized exception to the warrant requirement). This does not mean that a principal or other school official cannot ask a police officer to conduct a search, or that a police officer is precluded from complying with any such request. To the contrary, regulations promulgated by the State Board of Education and an Attorney General Executive Directive expressly authorize school officials to request a law enforcement agency to assume responsibility for conducting a search or seizure. See N.J.A.C. 6:29-10.3B4(ii). Rather, the rule is only that in these circumstances, the lawfulness of the search conducted by a law enforcement officer will doubtless be tested by applying the legal standard governing police searches.

In other words, a law enforcement officer is not permitted to become an agent of the school so as to take advantage of the less stringent and more flexible standard that applies to searches conducted by school officials. The converse, however, is not true. If a law enforcement officer asks or directs a school official to open a locker or otherwise conduct a search, the school official *will* be deemed to be an agent of law enforcement, and the legality of the search — even though technically undertaken by the school official — will be judged under the stricter rules governing law enforcement agencies. (See Chapter 4.5D(4)(a) for a more detailed discussion of when and under what circumstances law enforcement and school officials may work cooperatively to maintain school discipline without converting a search conducted by school officials into a law enforcement activity subject to the stricter rules that apply to law enforcement officers.)

2.6. Warning Concerning the Use of Private Drug Detection Dogs.

Some private companies make drug-detection canines available to schools for a fee. Because these animals and their handlers are not part of the law enforcement community, their use does not automatically invoke the stricter rules governing searches undertaken by law enforcement officers. But see Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 and Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980) (in both cases, the courts held that the Fourth Amendment applies even though the drug-detection dogs were privately owned).

The Attorney General, the county prosecutors, and other law enforcement agencies in this state cannot vouch for the effectiveness of these private services. For one thing, it is not always clear how these animals were trained, and whether their training regimen meets the high-quality standards governing the training of drug-detection canines used by law enforcement agencies. It is conceivable that some of the animals used by private companies have "washed-out" of law enforcement training schools.

In addition, it is not always clear how the scent recognition skills of these dogs are reinforced. The process of reinforcement must occur on a routine if not daily basis. Not all private security companies, however, have lawful access to Schedule I and II controlled dangerous substances such as marijuana, cocaine, heroin, and LSD. (Under federal law and regulations, persons may register with the Drug Enforcement Administration to obtain and use certain controlled substances for animal training and research purposes. See 21 U.S.C. § 823 and 21 C.F.R. 1301.21. See also N.J.S.A. 2C:35-18, which places the burden of proof on any individual who claims to be exempt from criminal liability by virtue of being registered to lawfully manufacture, procure, possess, or dispense a controlled dangerous substance.) School officials should be especially cautious before accepting and relying upon the services of animals that were trained or reinforced with "synthetic" drugs. (See Chapter 4.5C for a more detailed discussion of the factors used to establish the reliability and "track record" of a particular scent dog and handler.)

In sum, the Attorney General, the county prosecutors, and law enforcement agencies in this state offer no claim that a positive alert by a privately-owned and handled drug-detection animal constitutes probable cause or even reasonable grounds (the lesser standard of proof established in T.L.O.) to believe that the locker or other area identified by the animal contains a controlled dangerous substance.

It is critical to note, finally, that should schools elect to use privately-owned drug-detection canines, a school official or any other person who seizes or takes custody of an object or substance suspected to be a controlled dangerous substance or drug paraphernalia *must turn the substance or object over to the police or prosecutor's office*. See N.J.A.C. 6:29-10.5(a). It is a criminal offense in New Jersey to dispose of any controlled dangerous substance by any means other than by delivering the substance to a law enforcement officer. N.J.S.A. 2C:35-10c.

Under no circumstances may a school official destroy or "flush" suspected drugs. Nor may an employee of the private drug-detection company do so, even if the person is permitted under federal law to lawfully procure, handle, and even destroy drugs for canine training and research purposes. (Note that the federal exemption applies only to drugs that were obtained lawfully from another Drug Enforcement Agency (DEA) registrant, and does *not* apply to illicit drugs found in a search. In addition, the federal DEA requires that an application to register for purposes of training or using dogs in drug detection must include procedures for reporting any findings of illicit drugs to law enforcement officials. See K-9 Drug Detection Service of Florida, Inc., Denial of Application for Registration, 56 FR 5238 (1991).) Furthermore, the act of disposing any substance found in a search would not only constitute an offense under New Jersey's drug laws, but would also constitute the indictable crime of concealing or destroying evidence of a crime committed by another. See N.J.S.A. 2C:29-3a(3) and N.J.S.A. 2C:28-6. Note also that school officials (or an employee of the private company) would be required to tell police exactly where the drugs or paraphernalia were discovered, since the "amnesty" feature, codified at N.J.A.C. 6:29-10.5(a)(1) and discussed in more detail in Chapter 14.1C, would not apply in circumstances where the drugs were discovered in a search conducted by school officials or by any other person.

2.7. Err on the Side of Protecting Privacy Rights.

As a general proposition, this Manual adopts the principle, first announced by the New Jersey Attorney General in the *1985 School Search Guidelines* (see Appendix 1), that any doubts that a school official may have as to the propriety of a contemplated search should ordinarily be resolved in favor of respecting the student's privacy interests. In other words, when in doubt as to the lawfulness of a search, the better practice is to secure the scene and to seek legal advice from a prosecutor or school board attorney, rather than to undertake the search and possibly commit a violation of the Fourth Amendment or of Article I, Paragraph 7 of the State Constitution. (Note that preserving the status quo and seeking objective advice as to how best to proceed is *not* tantamount to ignoring the problem or doing nothing to respond.) This deliberate approach is consistent with the training that is provided to law enforcement officers, who are

instructed, for example, that when they have an opportunity to obtain a search warrant from a judge, they should pursue that option rather than to take it upon themselves to conduct a warrantless search.

We expect that not everyone will agree with this cautious approach. Many educators, parents, and law enforcement executives believe it is necessary to send the strongest possible message to children about our resolve to enforce rules and laws concerning drugs and weapons, and that this requires that school officials respond decisively when confronted with facts that suggest that such contraband is present in the schoolhouse. While school officials are permitted *and are expected* to react promptly and decisively, their response should never disregard the consequences of violating a student's constitutional rights.

Certainly when a firearm or explosive device is the object of a search, public safety issues arise that make it especially imperative for swift action. New Jersey courts have long recognized the significance of weapons, and especially firearms, when these are the objects of the search, and, for this reason, law enforcement officers are afforded greater flexibility in conducting a search for weapons under the so-called "exigent circumstances" doctrine. (See Chapter 12 for a more detailed discussion of this doctrine.) Of course, in any instance where students' safety is directly and imminently in peril, school officials would be well advised in any event to call the police and secure the area until the police arrive to make certain that no one enters the area who might remove, destroy, or use the suspected weapon or explosives device.

2.8. Using the "Least Intrusive Means."

It is a general principle of search and seizure law that reviewing courts will look to whether government actors had alternative options that they could have pursued to address the situation at hand. This principle, discussed in more detail later in the Manual, is sometimes referred to as "minimization," whereby police are encouraged to use the "least intrusive means" to accomplish their legitimate investigative objective.

The United States Supreme Court has repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995). Thus, the fact that a less intrusive option was available does not automatically mean that the searching technique that was chosen by school officials or police will be found to be unconstitutional. The legal test, ultimately, is whether the search at issue was reasonable, not whether a different tact would have been preferable. Even so, using the least intrusive method available in the circumstances demonstrates

an earnest effort to balance competing interests: the need to find evidence, to enforce the law and to protect the safety of the school community on the one hand, as against the duty to respect a student's constitutional rights on the other hand.

In the context of school searches, it is conceivable, for example, that school officials will be asked to explain why they chose to invite police to bring drug-detection dogs into a school, rather than to employ a locker inspection program whereby school lockers are randomly selected and searched for drugs or other contraband by school officials acting independently and without any law enforcement assistance. (These issues are addressed in detail in Chapter 4.5, and this Manual offers several options for school administrators who are trying to keep students from bringing drugs or weapons on to school property.)

This is not at all to suggest that it is either unlawful or inappropriate as a matter of policy to use drug-detector dogs. To the contrary, while the use of police-owned canines is controversial, arguably, this tactic constitutes *less* of an intrusion on students' privacy rights, as compared to a random locker inspection program, precisely because a drug-detection dog cannot reveal anything private about the contents of students' lockers. If anything, the dogs serve as a screening device, much like a metal detector, limiting the number of lockers that will have to be physically opened and searched. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), for example, the Pennsylvania Supreme Court recently upheld the use of trained drug-detection dogs to conduct a schoolwide locker inspection. The court emphasized that the dogs were specifically employed to limit the intrusion occasioned by the principal's decision to search the entire school. Because the dogs were used as a screening device, only a few of the 2,000 lockers subject to inspection were actually opened. Id. at 352-53, 362.

Furthermore, drug or weapons-detection dogs are an extremely useful tool that can be used, among other things, to send an appropriate message to students — one likely to get their attention — that school officials will not stand idly by while some students endanger the school community by bringing drugs or weapons on to school property.

In sum, while school officials are afforded considerable latitude in selecting among different options to respond to a particular problem, they should always try to minimize the negative effects of the tactic they ultimately choose. Thus, for example, this Manual strongly recommends that searches be done in private and away from the general student population to minimize the stigma associated with the search, and to lessen the possibility that a student might be embarrassed by the inadvertent discovery in the presence of classmates of non-contraband objects, such as implements of personal hygiene, birth control devices, or items that reveal sexual preferences or orientation.

Furthermore, as Justice O'Connor aptly observed in her dissenting opinion in Acton, "any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." 515 U.S. at __, 115 S.Ct. at 2402, 132 L.Ed.2d at ___ (O'Connor, J., dissenting).

For this same reason, representatives from the electronic and print media should not be invited to observe actual searches of students or students' possessions in circumstances where the identity of the students involved might be revealed. Compare Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (Swygert, Circuit Judge, dissenting) (commenting that the "extraordinary atmosphere" at the school was exacerbated when representatives from the news media were invited by school authorities to observe a scent dog raid and observed searches of the students in progress). See also R. 3:5-4 (requiring that search warrants be issued with all practicable secrecy, and declaring that disclosure, prior to its execution, that a search warrant has been applied for or issued may constitute contempt of court). While school officials may want to publicize the inspection event to achieve the maximum deterrent effect, and while media scrutiny might conceivably assuage concerns that such sweep inspections are conducted in a capricious or discriminatory way, the manner in which the inspection and any resultant searches are done must minimize privacy invasions, including breaches of confidentiality. Note in this regard that the New Jersey Legislature had adopted express provisions to ensure the confidentiality of information concerning suspected acts of delinquency committed by persons under the age of eighteen. (See N.J.S.A. 2A:4A-60 and Chapter 14.3.) Of course, law enforcement agencies must at all times scrupulously comply with the requirements of Executive Order 69, which spells out when and under what circumstances the public and representatives from the media are entitled to have prompt access to information about criminal activities occurring in the community.

2.9. The Need to Make Findings.

It cannot be emphasized strongly enough that the key to meeting the "reasonableness" test under the Fourth Amendment is for school officials to be able to articulate the *reasons* for their course of conduct. This is true with respect to both individualized or suspicion-based searches and generalized or suspicionless inspection programs. Obviously, if school officials are to conduct a search of a particular place in accordance with New Jersey v. T.L.O., they must be prepared to articulate and document the facts that provided reasonable grounds to believe that the search would reveal evidence of a crime or school rule infraction. By the same token, if, for example, school officials want to use police drug-detector dogs to sniff students' bookbags in addition to sniffing the outside of lockers, school officials should be prepared to explain, on the basis of recent experience and general information learned from students, that some students have

begun to carry drugs on their persons or in their knapsacks or bookbags for convenience or as a means of avoiding detection.

It is especially incumbent upon school officials to make a careful record explaining the reasons for any planned search, that is, a search that is not conducted on the spur of the moment based upon information just learned. In deciding search and seizure cases, courts recognize that police or school officials are sometimes required to act swiftly and without the opportunity for abstract contemplation that judges enjoy. When, in contrast, school officials have the opportunity to carefully plan a search by conducting, for example, a random locker inspection program or by inviting police to bring drug-detection dogs into the school, courts are likely to expect and require school officials to undertake a more careful and deliberate balancing of competing interests, and to conduct the search in a manner that best achieves its objectives while causing the slightest possible intrusion on students' legitimate privacy interests.

Indeed, the United States Supreme Court recently reaffirmed that to justify a suspicionless inspection program, school officials should be able to make a "showing of a prior demonstrated need." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995) (emphasis added). This suggests that school officials would do well to make a careful record in support of any planned inspection program *before* the program is challenged in court by an aggrieved student or parent. Reviewing courts are more likely to be skeptical of post hoc justifications that were thought up or researched by lawyers, rather than by school officials, only after a lawsuit had been filed.

Whether a search is planned in advance or takes place on the spur of the moment based on facts just learned, a reviewing court will always perform its own balancing test, but must do so based solely upon the facts set out in the record before the court. School officials and police will fare better in litigation if they are able to demonstrate the exact nature and extent of the interests weighed on both sides of the scales, and especially if they can document the *practical* problems and concerns that explain and justify the challenged search or inspection. While courts will never abdicate their responsibility to decide questions of law and fact, and thus may not defer to the judgment of school authorities or police officers, they will take into account the experience and expertise of government officials who are charged with the difficult task of maintaining order, discipline, and a safe drug-and-weapons-free environment in our schools. After all, the United States Supreme Court in New Jersey v. T.L.O. held that a child's interest in privacy must be balanced against "the substantial interests of teachers and administrators in maintaining discipline in the classroom and on school grounds." 105 S.Ct. at

741. It is therefore important that school officials be able to articulate the nature and extent of their interests in adopting a particular policy.

In making their findings to justify or explain a search or random inspection program, school authorities need not be concerned that their district has not experienced the severe crime or discipline problems associated with some schools. There is no minimum number of acts of violence, vandalism, or substance abuse in a particular school that must be documented before the school can adopt a particular search policy, and officials in these more fortunate schools or districts have a legitimate if not compelling interest in maintaining, not just restoring, a climate of safety and security. Indeed, the United States Supreme Court in T.L.O. expressly recognized that close supervision of students and the enforcement of school rules is necessary even in school systems that have been spared the most severe disciplinary problems. T.L.O., supra, 105 S.Ct. at 741.

Thus, in Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993), the court flatly rejected the argument that the school's policy of searching hand luggage carried by middle-school students on class trips was unreasonable simply because this was a suburban school system that had not faced the most serious disciplinary problems. The court also rejected the argument that the policy was unreasonable merely because the resulting searches of student hand luggage conducted between 1978 and 1991 had turned up contraband in only six instances. The plaintiff challenging the search policy pointed to that statistic as evidence that there was no problem at the school serious enough to justify these suspicionless searches. In rejecting that argument, the court in Desilets noted that it was equally possible that the search policy had been an effective deterrent. See also Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1985) (a low incidence of detection in a drug testing program "far from impugning the validity of the scheme ... is more logically viewed as a hallmark of success.")

2.10. Search Policies Must be Reasonable, Not Perfect.

One of the important recurring themes in school search law is that school policies should be designed — first and foremost — to discourage students from bringing drugs, alcohol, weapons, and other contraband on to school grounds. The fact that the deterrent effect of a particular program or policy is not perfect due to gaps or loopholes in the policy does not mean that the policy is unreasonable under the Fourth Amendment. Just because it is possible for students to evade detection under a particular program hardly means that the program is unconstitutional.

Lawyers sometimes describe such policies as being "underinclusive." In the Fourth Amendment context, however, school authorities should not be criticized for their failure to "push the envelope." It is not a valid criticism under the Fourth Amendment that the particular policies or procedures adopted by a school do not go far enough in detecting contraband or in precluding students who are bent on violating the law or school rules from bringing or keeping drugs or weapons on school grounds. Regrettably, some offenders will always be able to find a way to get past our efforts to interdict harmful substances and weapons — a point that is underscored by the presence of drugs and weapons in prisons, which are far more secure than schoolhouses.

The issue, ultimately, is whether the policies or procedures employed are a reasonable response to the problem that exists in the school. Of course, school authorities should be mindful that if a particular policy or program has little or no actual, documented benefits, there would be little to balance against the intrusion on students' Fourth Amendment privacy interests. Ill-conceived and totally ineffective procedures, in other words, are not likely to fare well in the balancing test used by the courts to decide whether the Fourth Amendment has been violated.

It is nonetheless important to remember that the utility and benefits of a particular program or procedure should not be measured solely by reference to how many students have been "caught" violating the law or school rules, since the failure to reveal evidence may indicate that the policies or procedures have been effective in deterring students from engaging in prohibited conduct. Indeed, courts have recognized that established search procedures may be more valuable for what they discourage than for what they discover. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993) (quoting United States v. Herzbrun, 723 F.2d. 773 (11th Cir. 1984) (the fact that a school has adopted a policy of inspecting hand luggage, but not student clothing or pockets, cannot be successfully challenged merely because students could easily circumvent the inspection process simply by concealing drugs, weapons, or other contraband in their pockets).

2.11. The Importance of Developing a "Neutral Plan" in Conducting an "Administrative Search."

When school officials conduct a so-called "suspicionless" search, they must provide safeguards that take the place of the particularized suspicion standard announced by the United States Supreme Court in T.L.O.. Specifically, a suspicionless search or inspection program should be done pursuant to a "neutral plan" that imposes significant limitations on the discretion of the school officials who will be selecting

lockers for inspection. By limiting discretion, a neutral plan decreases the chance that a search will be based upon capricious or discriminatory criteria.

The body of law that describes these "neutral plans" is sometimes referred to as the law governing "administrative" searches. There is considerable authority in the caselaw for so-called administrative searches, which are not designed to find evidence of crime, but rather are used to protect public health and safety. Such inspections are allowed provided that they are conducted pursuant to a reasonable plan supported by a valid public interest. See Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305 (1978) (OSHA searches were found to be reasonable because the warrants were based on a general plan for enforcement of a statute derived from "neutral principals").

There is every reason to believe that in this state, the principles established in these administrative search cases can be applied to inspection programs designed and implemented by school authorities. Indeed, the New Jersey Supreme Court in T.L.O. expressly noted that, "[w]e are satisfied that the legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes." 94 N.J. 331, 343-344 (emphasis added).

As a general proposition, government officials may not use an administrative search to uncover evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1987). The presence of both administrative (i.e., health and safety) and criminal investigative purposes, however, does not necessarily invalidate an otherwise lawful administrative search, provided that the "primary object" of the search is not to gather evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294 (1984) and New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) ("The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.") That is why it is so important that school officials emphasize that a locker inspection program is designed principally to enhance safety in the school by discouraging students from keeping drugs or weapons on school grounds, rather than to apprehend and prosecute juvenile offenders. By the same token, it is well settled that if a valid administrative search does disclose evidence of criminal activity, that evidence may be seized and admitted in a criminal prosecution. See Michigan v. Clifford, 464 U.S. 287, 294 (1984).

Most of the above-cited cases involved administrative searches that were authorized by a warrant or an entry and inspection order issued by a judge. See also State v. Hempele, 120 N.J. 182, 221-223 (1990) (discussing standards in New Jersey

for obtaining administrative search warrants). The United States Supreme Court has also upheld reasonable *warrantless* administrative searches of "pervasively regulated" business premises. See e.g., New York v. Burger, 482 U.S. 691 (1987). This exception to the warrant requirement is justified by the important role of periodic inspections in enforcing health and safety regulatory schemes, coupled with the reduced expectation of privacy flowing from "pervasive regulation." Id. at 704-707.

Arguably, these same factors are relevant in the context of school locker inspection programs. Indeed, the New Jersey Supreme Court in T.L.O., in analogizing school searches to administrative searches, recognized that government officials may not conduct warrantless administrative searches of property except in certain carefully defined classes of cases, most notably, those involving pervasively regulated businesses. The Court noted that, "although the school setting does not at first glance fit that general mode, within that matrix we examine the statute and conduct of the [school official] in this case." 94 N.J. at 342. (citations omitted). After carefully reviewing the statutory responsibility of schools to maintain order, safety, and discipline, and their broad authority over schoolchildren, the New Jersey Supreme Court concluded, ultimately, that school officials may conduct a search without having to obtain a warrant. Given the New Jersey Supreme Court's mode of analysis in T.L.O., it would seem that it would not be unreasonable to assume that the general principles governing administrative searches can be applied to searches conducted by school officials. (This will become especially important later in this Manual when we discuss the authority of schools to conduct a *suspicionless* inspection program. See Chapter 4.2 and 4.4.)

In New York v. Burger, supra, the United States Supreme Court held that a warrantless administrative search of a pervasively-regulated industry is reasonable provided that: (1) there is a substantial governmental interest behind the regulatory scheme being enforced; (2) the search is necessary to further that scheme; and, (3) the authorizing statute is an adequate substitute for the warrant in giving notice to owners and limiting the discretion of those conducting the search. Id at 702-703. These should be the guiding principles that school officials use to design and implement a suspicionless inspection program, and these principles are discussed in far greater detail in Chapter 4.4.

2.12. Broad Supervisory Authority of Schools.

Public school officials exercise considerable control and authority over schoolchildren. In State in Interest of T.L.O., the New Jersey Supreme Court recognized that the "Legislature has specifically charged school officials to maintain order, safety and discipline." 94 N.J. at 342-343. Statutes give school officials the authority to prevent

disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority. N.J.S.A. 18A:37-1. The same statute that prohibits both public and private school employees from inflicting corporal punishment also expressly authorizes such employees to "use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;
(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
(3) for the purpose of self-defense; and,
(4) for the protection of persons or property. (N.J.S.A. 18A:6-1).

Furthermore, a regulation adopted by the State Board of Education declares the goal that "every school in New Jersey will be free of drugs and violence and offer a safe, disciplined environment conducive to learning." N.J.A.C. 6:8-21.

Although the authority exercised by school officials over students is pervasive and sweeping, it is not without limitation. While taking note of the inherent difficulty in maintaining discipline in schools, the United States Supreme Court in T.L.O. found that the situation is not so dire that students may claim no expectations of privacy that serve to circumscribe the authority of school officials to conduct searches whenever they want to. Notably, the Court rejected the idea that the Fourth Amendment rights of schoolchildren were comparable to the minimal rights afforded to prison inmates. The Court had already ruled that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells. The Court concluded that, "it goes almost without sayings that '[t]he prisoner and the schoolchild stand in wholly distinct circumstances, separated by the harsh facts of criminal conviction and incarceration.'" New Jersey v. T.L.O., supra, 105 S.Ct. 733, 741, quoting Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711 (1977). The Court in T.L.O. stated emphatically that, "we are not yet ready to hold that schools and prisons need to be equated for purposes of the Fourth Amendment." 105 S.Ct. at 741.

Despite statistics that document the nature and scope of the modern day drug and violence problems in our schools, it is highly unlikely that the United States Supreme Court, much less the New Jersey Supreme Court, would adopt a different view today.